

1 IN THE KENTUCKY PUBLIC SERVICE COMMISSION

2
3
4 IN RE: INVESTIGATION:

5 Case No. 2003-00433
6 AN ADJUSTMENT OF THE GAS AND ELECTRIC RATES,
7 TERMS, AND CONDITIONS OF LOUISVILLE GAS AND
8 ELECTRIC COMPANY

9 and

10 Case No. 2003-00434
11 AN ADJUSTMENT OF THE ELECTRIC RATES, TERMS, AND
12 CONDITIONS OF KENTUCKY UTILITIES COMPANY

13 * * *

14
15 SWORN STATEMENT

16 OF

17 DAVID J. BARBERIE

18 AUGUST 12, 2005
19
20

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8/25/05 *[Signature]*

A P P E A R A N C E S

SPECIAL GENERAL COUNSEL TO THE PUBLIC SERVICE
COMMISSION:

JONATHAN D. GOLDBERG
Goldberg & Simpson
3000 National City Tower
101 South Fifth Street
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1 The sworn statement of DAVID J.
2 BARBERIE, taken telephonically in the offices of the
3 Public Service Commission, 211 Sower Boulevard,
4 Frankfort, Kentucky, on Friday, the 12th day of
5 August, 2005, at approximately 1:35 p.m.

6
7 EXAMINATION

8
9 BY MR. GOLDBERG:

10 Q. Could you state your full name.

11 A. David Jeffrey Barberie.

12 Q. And your business address?

13 A. 200 East Main Street, Department of
14 Law, Lexington, Kentucky, 40507.

15 Q. All right, sir. And what is your
16 occupation?

17 A. I'm corporate counsel for the
18 Lexington-Fayette Urban County Government.

19 Q. Okay. And how long have you been in
20 that capacity?

21 A. About five and a half years.

22 Q. All right, sir. Are you familiar with
23 the Commonwealth of Kentucky Public Service
24 Commission?

25 A. I am.

1 Q. All right. With regard to matters
2 before the Public Service Commission, what role have
3 you played?

4 A. I'm trying to recall exactly what year
5 this would have been. I would say from possibly the
6 first year I began practicing in the state of
7 Kentucky for the Urban County Government, which would
8 have been the year 2000, I started to have a role in
9 representing, either as a joint counsel or as sole
10 counsel for the Urban County Government, its
11 participation in Public Service Commission cases that
12 it felt it had an interest in.

13 Q. All right, sir. With regard to that,
14 I will represent to you that in November of 2003,
15 LG&E and KU, Kentucky Utilities, filed a notice of
16 intent to seek a rate adjustment. Do you have a
17 recollection of that?

18 A. I have a -- I have a general
19 recollection. I don't know if we found out about it
20 exactly when it was filed, but it certainly would
21 have been in short order after it was.

22 Q. Okay. Well, tell me what
23 participation you had after the case was actually
24 filed, which actually would have been December of
25 2003.

1 A. My recollection is we probably found
2 out -- well, I may have actually read about it in the
3 newspaper because the newspaper probably picked it
4 up, although I'm thinking it was probably the very
5 end of November that there was any indication that
6 there might be a filing, at least publicly. Shortly
7 after it was actually filed and we became formally
8 aware that there was such a case, the Urban County
9 Government moved to intervene as a party -- as a full
10 intervener in the action.

11 Q. All right, sir. Prior to the
12 intervention by Lexington-Fayette County Government,
13 had you had any contact with any other intervener
14 about the rate cases, to your knowledge?

15 A. I don't -- I don't believe so. It's
16 possible that someone working for the law firm that
17 represents Kentucky Utilities gave us some sort of
18 heads-up that they were going to file something, but
19 that -- I don't know that they did off the top of my
20 head. And if it was, it was more of "we're going to
21 file this," and there was no substantive conversation
22 about what it entailed or anything like that.

23 Q. All right, sir. Let me ask you that
24 same question. Did you have any contact with any
25 person from -- representing Kentucky Utilities or

1 Louisville Gas & Electric?

2 A. What time frame are we talking about?

3 Q. Prior to --

4 A. I don't -- I don't think so.

5 Q. All right, sir. Is there anybody
6 besides yourself assigned to the rate cases?

7 A. At that time --

8 Q. Yes, sir.

9 A. -- generally, I would have been the
10 primary person. We have a director of litigation,
11 Leslie Bowman, and a commissioner of law, David
12 Holmes. Those were the same people at that point in
13 time. And if for some reason I was not the first
14 person in the department of law to find out about it,
15 it's possible that they would have at least been
16 provided a copy of the application, for instance, at
17 the same time or possibly before I was.

18 Q. To your knowledge, were you the only
19 person from Lexington-Fayette County Government legal
20 team to make an appearance before the Public Service
21 Commission on these rate cases?

22 A. To my knowledge, I was the only one
23 that appeared in person over there. I don't recall
24 whether or not Leslie Bowman also signed off as a
25 signatory on some of the pleadings. Her name likely

1 appears at least on some of them, but with respect to
2 actually going over to the Public Service Commission,
3 I believe that I was the only one.

4 Q. Okay. I would like now for you to
5 think about the time frame between the time the rate
6 adjustment was filed, which we can call the end of
7 December 2003, until April 28th, 2004, which is the
8 date of the informal conference on the two rate
9 cases. Using that as a time frame, can you tell me
10 what work you performed on the rate cases during that
11 period of time, if any.

12 A. The period of time before the actual
13 conference was scheduled for?

14 Q. Yes.

15 A. We -- we had a number of meetings,
16 some of which I really can't get into the content
17 because of attorney/client, but we had a number of
18 internal meetings involving our staff to decide what
19 issues we wanted to focus on in this particular case
20 with respect to what the Urban County Government's
21 interests would be. I believe we propounded possibly
22 more than one round of discovery on the -- on the
23 utility company. Off the top of my head, I do not
24 think, although it's possible -- I'd have to go back
25 and look at my file. I don't think we propounded

1 discovery on any other party in the case. And right
2 now I -- I didn't go back -- and let me tell you why
3 I didn't go back and look at my file, because until
4 the words "we think there's been some sort of
5 ex parte," whatever, came out of the assistant
6 attorney general's mouth at the -- at the hearing, I
7 had no reason to think that anything like that was
8 allegedly going on.

9 So to the extent I took notes or
10 anything on this stuff, none of them were -- were
11 couched towards keeping -- observing some --
12 something like that going on. So I didn't think it
13 was a high value for me to go back and look at my
14 file. If I had to, I might be clearer on the amount
15 of discovery we did. But in sum, we did a -- at
16 least a moderate amount of discovery prior to the
17 hearing.

18 Q. Did you prepare and file any expert
19 testimony on behalf of your position?

20 A. We did not.

21 Q. Okay. Did you have any contact with
22 any members of the staff or the commission members
23 themselves between the time of the filing of the rate
24 adjustment cases and April 28, 2004?

25 A. I don't believe so. Sometimes from

1 time to time in my -- in my commission practice I may
2 contact the attorney of record to ask them, for
3 instance, a procedural question of how long something
4 might take or something like that. But in this
5 particular case, I don't -- my impression was I was
6 anticipating it possibly taking several weeks, and it
7 was a surprise to me when it looked like it might be
8 on track to actually not have a hearing when I got
9 over there. So I -- I don't think there was any
10 contact between myself. And if there was, it would
11 have been between myself and -- and one of the staff
12 people over there. I've never had a direct contact
13 with any commission member over there. Nor, frankly,
14 other than sending stuff to file under general cover
15 letter, have I ever had a contact with the executive
16 director over there either.

17 Q. All right, sir. April 28, 2004, the
18 date of the informal conference, did you attend that?

19 A. Yes.

20 Q. Okay. And --

21 A. Assuming that's the first -- I don't
22 have the date in front of me, but I was there for the
23 first date that the hearing was supposed to take
24 place on.

25 Q. Okay. Let me see if I can refresh

1 your recollection. April 28th was an informal
2 conference to get organized on how the hearing
3 procedures would be. May 4th is the first date of
4 actual hearing.

5 A. Okay. I believe -- to the best of my
6 knowledge, I did attend the informal conference.

7 Q. All right, sir. Now, it's my
8 understanding that in addition to getting organized
9 that day that there were some settlement
10 negotiations. Did you participate in those?

11 A. It -- I'm not trying to be obtuse,
12 it's just I'm -- I think at this point in time I'm
13 running together when the official proceedings
14 started versus when it -- you know, what date the
15 actual hearing was to take place on versus the
16 informal conference. I did participate. I was
17 present in the room when there was a general
18 discussion which, to my observation, appeared to
19 include everyone that I believe to be a party of
20 record in the case. There was a general settlement
21 discussion and -- and along the lines of whether or
22 not this -- this particular case -- or I guess
23 technically it was two cases, were in a position to
24 possibly settle. And by my recollection, that took
25 place over probably the period of almost an entire

1 day.

2 Q. All right, sir. But am I
3 understanding you cannot discern in your recollection
4 whether it was April 28th, date of informal
5 conference, or one of the hearing dates the
6 following --

7 A. To the -- Now that we're sitting here
8 talking about it, my recollection is that prior to
9 the date the hearing was actually supposed to take --
10 and the only thing I'm not clear on in my mind is
11 whether -- I will take your word that April 28th was
12 the day of the informal conference. I was over there
13 the week before for an informal conference, at which
14 time there was a general discussion about potentially
15 settling the two cases.

16 Q. All right, sir. Was everybody -- all
17 parties, LG&E/KU representatives and interveners in
18 hearing room 2 during those discussions?

19 A. Once again, I was not looking
20 specifically to see if everyone was in the room
21 because I did not realize that there was going to be
22 an ex parte issue. But to the best of my
23 recollection, to the extent I was aware of there
24 being parties in the case, I believe that all of the
25 parties that I was aware of were -- were in the room

1 during the discussions.

2 Q. All right, sir. And what is your best
3 recollection on how long those discussions went on?

4 A. It seemed to be that they -- I believe
5 it would have been the greater part of a day, if
6 not -- and this is where my memory is going to get
7 fuzzy on when the conferencing took place versus when
8 the hearing actually was scheduled to take place.
9 It's possible that the actual informal conferencing
10 took place over a number of days. But to my
11 knowledge, it was a lengthy period of time.

12 Q. All right. Did you yourself have any
13 conversations with staff members about the rate cases
14 that did not take place in the negotiation room,
15 hearing room 2?

16 A. No.

17 Q. Okay. I will represent to you that
18 there were discussions amongst the parties the next
19 day, April 29th. Do you believe you attended those
20 discussions?

21 A. I believe that was -- I believe that
22 in large part, with the exception of potentially
23 leaving at some point in time when these things --
24 when there was conferencing going on well into the
25 evening and I was satisfied that the -- the interests

1 of my client was going to be preserved regardless of
2 what else was being discussed, I was involved in
3 several days' worth of negotiating towards the
4 settlement.

5 Q. All right. But am I understanding
6 that you cannot discern the difference between
7 April 29th and then the following week, or do you
8 recall being there on April 29th?

9 A. I believe that I -- I believe that I
10 was there for a number of days in a row talking about
11 nothing other than attempting to settle the case.

12 Q. Okay. And I take it they run together
13 and it's hard at this point to figure out which day
14 was which. Is that what you're telling me?

15 A. Yeah. Because here's -- here's where
16 my confusion lies. I -- obviously I know that we did
17 not have a hearing, per se, because we were
18 representing to the Public Service Commission that it
19 was settled. What I don't recall off the top of my
20 head is whether or not we were at a point where we
21 were close to settling the case when this was
22 originally going to be scheduled, or whether the bulk
23 of these discussions that I took place in actually
24 took place after the case was originally going to be
25 scheduled for hearing. That's where my confusion

1 lies.

2 Q. All right. Let me see if I can give
3 you some dating that will help you. April 28th was
4 the informal conference. The parties did not
5 formally meet, although there were discussions, on
6 April the 29th. There were no discussions with all
7 the parties on the 30th, although there was some
8 discussion among the interveners, some of them, and
9 LG&E personnel. That was the week's events of that
10 week.

11 In the subsequent week, the parties
12 did not meet on May the 3rd, which would have been
13 Monday, but did meet May 4th, 5th and 6th, Tuesday,
14 Wednesday and Thursday.

15 A. Right.

16 Q. All right. And finally I'll represent
17 to you there was hearing on May the 12th. Those were
18 all dates of either negotiation or hearings or both.
19 Using that as a frame of reference, do you have a
20 sense of, one, did you attend all the sessions?
21 Let's start with that.

22 A. I would -- here's -- I recall -- to
23 the extent I thought my client had a direct interest
24 in what was being discussed as opposed to a potential
25 discussion on an issue or issues that my client

1 really did not have a direct interest in, I
2 participated in a great deal of settlement
3 discussions. And when I participated in them, to my
4 observation and recollection, they involved every
5 party that was -- that was a party to the case. With
6 respect to other potential side meetings, I'm not
7 aware of how many of those took place or actually
8 when they might have taken place.

9 Q. Were you aware that side meetings
10 were -- were occurring?

11 A. It would be my general observation
12 that perhaps some of the parties had issues that --
13 that did not involve my client, and they were -- my
14 observation was they appeared to be discussing those
15 with other parties to the case, but not necessarily
16 with anyone from the commission staff being present.

17 Q. Okay. And were those discussions
18 reported back to the group as a whole?

19 A. That was my general impression, yes.

20 Q. All right. Okay. Did you -- am I
21 taking this correctly, that you only had an interest
22 in limited issues? To that end does the term
23 "revenue requirement" mean anything to you?

24 A. Excuse me?

25 Q. Does the term "revenue requirements"

1 mean anything to you?

2 A. Yes.

3 Q. Okay. I take it Lexington-Fayette
4 Urban County Government was interested in the revenue
5 requirement issues as they related to KU.

6 A. That's correct.

7 Q. Okay. Anything else would have
8 been -- would there have been any other issues of
9 interest to Lexington-Fayette Urban County
10 Government --

11 A. Our primary interest in the case,
12 other than obviously trying to keep the overall rate
13 increase as low as possible, is we are the -- we are
14 the largest public street light consumer of Kentucky
15 Utilities. So we had a specific interest in
16 attempting to keep the rate increase for
17 streetlights, and "streetlights" meaning street
18 lighting and not traffic lights -- keeping
19 streetlights as low as possible.

20 And we had other significant
21 categories of classifications where, although we were
22 not, per se, the largest consumer, we had enough
23 significant accounts with Kentucky Utilities of those
24 types of classes where we were attempting to try to
25 limit the rate increase to those particular classes.

1 Q. All right.

2 A. So somewhat I'm telling you is we
3 had -- we had specific classes of customer -- utility
4 customer bases that we were trying to limit the
5 impact of the overall rate increase.

6 Q. Do you recall having discussions with
7 KU and LG&E personnel in the settlement conference
8 room, hearing room 2?

9 A. Yes.

10 Q. You participated in those. Did you
11 participate in any sidebar meetings with
12 representatives of KU and LG&E?

13 A. I would have had a limited number of
14 sidebar issues potentially with legal parties for --
15 or the legal staff -- or the legal -- the law firm
16 that represented Kentucky Utilities. I don't think
17 that -- I guess -- I guess to some extent there was
18 some limited discussion with some of their experts on
19 some of these issues for clarification purposes, and
20 these all took place in the same room that all of
21 these other discussions were taking place in.

22 Q. Okay. Hearing room 2.

23 A. Yes.

24 Q. All right. Using this time line,
25 May 4th, 5th and 6th, did you have any realization

1 that at some time on one of those days the parties --
2 all parties were in agreement on all items, including
3 revenue requirements?

4 A. My recollection is that -- I believed
5 all parties were in substantial agreement, and I
6 believed that the attorney general -- whether it was
7 on this issue or other issues, I don't really
8 remember off the top of my head. But I believe the
9 representatives for the attorney general made some
10 representation that they needed to obtain, quote,
11 unquote, final authority on this, but they thought
12 that this -- that this thing was pretty much settled.

13 Q. Okay. And using May 4th, 5th and 6th
14 as the dates, can you pick -- or does your
15 recollection allow you to focus in on what date you
16 remember that conversation?

17 A. No.

18 Q. Okay. Do you recall a time during
19 those three days that you learned that the attorney
20 general was no longer in agreement with the parties
21 on settling all the issues?

22 A. Well, I was there when I became aware
23 that the attorney general was not in agreement, but I
24 cannot recall on which particular date it was.

25 Q. Okay. And tell me how you became

1 aware.

2 A. I first became aware that when -- when
3 Dennis Howard made an announcement at the -- at
4 pretty much this room 2 type of discussion.

5 Q. Okay. And what do you recall him
6 saying?

7 A. I recall him saying that the attorney
8 general was -- was not going to be a party to this,
9 and there was some general suggestion that there
10 might have been some untoward event going on with
11 respect to -- with respect to settling the case.

12 Q. Okay. And you learned that from
13 Mr. Howard in the room?

14 A. Yeah. That's -- to the best of my
15 recollection, that's the first I heard of it.

16 Q. All right. Let me --

17 A. And my recollection also is I believe
18 at some point in time the attorney general came over
19 to -- so, you know, it's possible that that happened
20 earlier, but I -- my recollection off the top of my
21 head is I believe Mr. Howard made a representation
22 that the attorney general had a problem with settling
23 this thing. And then my recollection is either
24 shortly thereafter or possibly the next day the
25 attorney general himself had some sort of press

1 conference with respect to -- to this particular
2 matter.

3 Q. Okay. Focusing in on the next day,
4 let's call it May the 5th, do you have a recollection
5 that a staff member went on the record at the
6 beginning of the hearing day stating that he had
7 overheard an interview with the attorney general on
8 the radio when the attorney general had made the
9 accusation that there was ex parte, collusive and/or
10 inappropriate behavior going on at the Public Service
11 Commission? Were you present in the hearing room
12 that day?

13 A. I more than likely was, but I don't
14 specifically recall that -- that being said. It's
15 quite possible it was.

16 Q. Okay. Subsequent to that, do you
17 recall the chairman of the commission going around
18 the room and requesting to know whether or not people
19 were aware of ex parte, collusive or inappropriate --

20 A. I do.

21 Q. All right. And did you participate at
22 that point?

23 A. I did.

24 Q. And what was your response?

25 A. My response was that I was not aware

1 of any type of activity.

2 Q. Okay. Now, since that point in time,
3 have you been made aware of any ex parte, collusive
4 or inappropriate behavior that occurred in this
5 process?

6 A. In this case?

7 Q. Yes, sir.

8 A. None.

9 Q. Okay. With regard to your contacts,
10 did you at any time, other than in the hearing room
11 for the settlement negotiations or as part of the
12 record, have any communication with staff members
13 about the rate cases?

14 A. I don't -- I don't believe so. I
15 mean, I know some of the staff members over there
16 better than others, and I don't -- I think this was
17 Richard Raff's case, if I remember right. And I
18 don't -- I don't know Richard that well, so I don't
19 believe I probably had a conversation with him about
20 anything. And I did not have a conversation with any
21 of their other staff members.

22 Q. All right, sir. And do I take it from
23 your earlier statement that you've never had a
24 conversation about the rate cases with any commission
25 member?

1 A. I've never had a conversation with any
2 of the commissioners about anything.

3 Q. All right. Did you yourself witness
4 anything during these procedures that you thought was
5 an ex parte communication or indication of collusive
6 or inappropriate behavior?

7 A. No.

8 MR. GOLDBERG: All right, sir. That's
9 all I have, Mr. Barberie. Thank you.

10

11 (STATEMENT CONCLUDED AT 2:00 P.M.)

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1 STATE OF KENTUCKY)(
)(SS:
2 COUNTY OF JEFFERSON)(
3

4 I, ELLEN L. COULTER, Notary Public,
5 State of Kentucky at Large, hereby certify that the
6 foregoing sworn statement was taken at the time and
7 place stated in the caption; that the appearances
8 were as set forth in the caption; that prior to
9 giving testimony the witness was first duly sworn by
me; that said testimony was taken down by me in
stenographic notes and thereafter reduced under my
supervision to the foregoing typewritten pages and
that said typewritten transcript is a true, accurate
and complete record of my stenographic notes so
taken.

10 I further certify that I am not
11 related by blood or marriage to any of the parties
hereto and that I have no interest in the outcome of
captioned case.

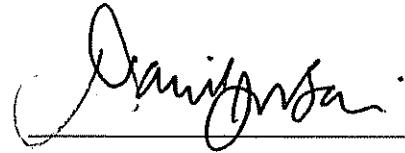
12 My commission as Notary Public expires
November 5, 2007.

13 Given under my hand this the 24th
14 day of August, 2005, at Louisville,
15 Kentucky.

16
17 

18 ELLEN L. COULTER
19 NOTARY PUBLIC
20
21
22
23
24
25

1 I, the undersigned, DAVID J. BARBERIE, do
2 hereby certify that I have read the foregoing sworn
3 statement, and that, to the best of my knowledge,
4 said sworn statement is true and accurate, with the
5 exception of the corrections, if any, listed on the
6 errata sheet.

7 
8

9 DAVID J. BARBERIE

10
11 Subscribed and sworn to before me this 4
12 day of October, 2005.

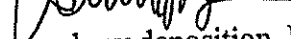
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16 NOTARY PUBLIC

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19 My commission expires 01/13/08
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COULTER REPORTING, LLC
101 EAST KENTUCKY STREET, SUITE 200
LOUISVILLE, KY 40203

ERRATA SHEET

NAME David J. Barberie DATE OF DEPOSITION August 12, 2005


After having read my deposition, I wish to make the following changes:

Page 17 Line 2
Change "somewhat" to "what"
Reason for change CLARIFICATION - DID NOT SAY "SOMWHAT"

Page _____ Line _____
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Reason for change _____

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a -- [2] 4/18 8/15	BARBERIE [4] 1/17 3/2 3/11 22/9	Commonwealth [1] 3/23
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accounts [1] 16/23	be [15] 5/6 7/21 8/14 9/7 10/3 10/11 10/19 11/21 12/4 13/1 13/22 13/24 15/11 15/14 19/8	company [3] 1/6 1/11 7/23
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accusation [1] 20/9	because [6] 5/3 7/17 8/3 11/21 13/15 13/17	CONCLUDED [1] 22/11
action [1] 5/10	been [15] 3/19 4/5 4/8 4/21 4/24 6/9 6/15 8/4 9/11 12/5 14/12 16/8 16/8 19/10 21/3	CONDITIONS [2] 1/6 1/11
activity [1] 21/1	been -- [1] 16/8	conference [12] 7/8 7/13 9/18 10/2 10/6 10/16 11/5 11/12 11/13 14/4 17/7 20/1
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actually [10] 4/23 4/24 5/2 5/7 7/2 9/8 11/9 12/8 13/23 15/7	began [1] 4/6	confusion [2] 13/16 13/25
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